87

(1)

Supreme Court, U.S.
FILED

071137 OCT 23 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DANIEL CALLAGHAN, PRO SE,
Petitioner,

v.

STATE OF FLORIDA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL CALLAGHAN, PRO SE
7108 Daggett Terrace
New Port Richey, FL 34655
(727) 372-1742

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Comes now, Petitioner Daniel Callaghan, Pro Se, wishing the Court to review the following questions:

Should the U.S. Court of Appeals, 11th Circuit, deny the Petitioner's requests for a Certificate of Appealability, initially denied by U.S. District Court Judge Steven Merryday, Middle Court, Florida, Tampa Division, as well?

Is the denial of Petitioner's earlier request for a petition for a writ of habeas corpus unduly restricted by an inappropriate application of the Anti-Terrorism and Death Penalty Act of 1996 that prevents constitutional protections of due process given in Amendments V and XIV?

Is the trial court judge's decision to deny Petitioner presenting a Necessity Defense (because he equated it with Self-Defense) a denial of legal protections for a defendant to present a full and vigorous defense?

Is the failure of the trial court judge to allow consideration of a juror's sworn affidavit (showing a juror broke the law) grounds for acquittal or requiring a new trial?

Is the Petitioner's appeal based on prosecutorial misconduct grounds for an acquittal or a new trial?

LIST OF PARTIES

U.S. Court of Appeals, 11th Circuit
56 Forsyth Street, N.W.
Atlanta GA 30303

U.S. District Court Judge Steven D. Merryday
U.S. District Court, Middle District of Florida,
Tampa Division
Sam Gibbons Courthouse, 801 North Florida Avenue
Tampa FL 33602

Susan Shanahan, Attorney for the Asst. Attorney General, Fl.
Concourse Center 4, 3507 E. Frontage Rd., Suite 200
Tampa FL 33607

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISION 2

STATEMENT OF THE CASE 18

REASONS FOR GRANTING THE PETITION 26

CONCLUSION 28

APPENDIX:

Appendix A

U.S. Court of Appeals ruling on Motion for Reconsideration 1

Appendix B

U.S. Court of Appeals ruling on Certificate of Appealability 3

Appendix C

U.S. Court of Appeals Certified Copy of Order Denying COA 4

Appendix D

U.S. District Court Ruling on Petition of Writ of Habeas Corpus 6

Appendix E

U.S. District Court Order Accepting Petition for Writ of Habeas Corpus 19

Appendix F

Supreme Court of Florida Dismissal of Petition for Review 23

Appendix G

Supreme Court of Florida Acknowledgment of New Case 24

Appendix H

Sworn Affidavit of Juror Christine Goracio 26

TABLE OF AUTHORITIES

CASES:

Alderman v. U.S., 394 U.S. 165 (1969) 17

Armstrong v. Manzo, 380 U.S. 545 (1965) 12

Benton v. Maryland, 395 U.S. 784 (1969) 11

Berger v. U.S., 295 U.S. (1935) 18

Brady v. Maryland, 373 U.S. 83,
83 S.Ct. 1194 (1963) 18

Darden v. Wainwright, 477 U.S. 168,
106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) 8

Duncan v. Louisiana, 391 U.S. 145 (1968) 11

Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475,
116 L.Ed.2d 385 (1991) 4

Estes v. Texas, 381 U.S. 532 (1965) 17

Gideon v. Wainwright , 372 U.S. 335 (1963) 11

Hooper v. State, 476 So.2d 1253 (Fla., 1985) 10

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555,
131 L.Ed.2d 490 (1995) 17

Lockyer v. Andrade, No. 01-1127, S.Ct. (2003) 10

Malloy v. Hogan, 378 U.S. 1 (1964) 11

Mapp v. Ohio, 367 U.S. 643 (1961) 11

Mathews v. U.S., 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) 6

Mooney v. Holohan, 294 U.S. 103 (1935) 18

Palko v. Connecticut, 302 U.S. 319 (1937) 11

Rose v. Clark, 478 U.S. 570 (1974) 17

Tanner v. U.S., 483 U.S. 107, 107 S.Ct. 2739, 97 L. Ed.2d 90 (1987) 7

Twining v. New Jersey, 211 U.S. 78 (1908) 11

U.S. v. Aguilar, 883 F.2d 662 (9th Cir. 1989) 14

U.S. v. Bailey, 444 U.S. 394, 1005 S.Ct. 624, 62 L.Ed.2d 575 (1980) 13

U.S. v. Duclos, 214 F.3d 27 (1st Cir. 2000) 12

U.S. v. Durrell, 785 F.2d 427 (9th Cir. 1985) 16

U.S. v. Gant, 691 F.2d 1159 (5th Cir. 1982) 16

U.S. v. Greenpeace, USDC, So. Distr. of Florida Middle Div., Miami, Case No. 03-20577 12

U.S. v. Hill, F. Supp. 1044 (N.D. Fla. 1994) 13

U.S. v. Leon, 468 U.S. 897 (1984) 17

U.S. v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483 (2001) 12

U.S. v. Opdahl, 930 F.2d 1530 (11th Cir. 1991) 13

U.S. v. Val Fillenwarth, No. 4:06-pu-00038GMF, January 16, 2007 12

U.S. v. Williams, 504 U.S. 36 (1992) 18

Walker v. Jones, 10 F.3d 569 (11th Cir. 1994) 9

Washington v. Texas, 388 U.S. 14 (1967) 11

Wolf v. Colorado, 338 U.S. 25 (1949) 11

CONSTITUTIONAL PROVISIONS AND CODES:

Article I, Section 9, U.S. Constitution 1

Article VI, U.S. Constitution 1

U.S. Constitution

- Amendment V i
- Amendments I, V, IX, and XIV 3
- Amendment X 3
- Amendment XIV ..... i, 11

Anti-Terrorism & Death Penalty Act of 1996 (AEDPA) ..... i, 2, 5, 10

18 U.S.C. § 1382 16

MISCELLANEOUS:

Model Penal Code, Section 3.02 13

Hall, J. General Principles of Criminal Law, p. 416 (2d. ed., 1960) 13

Sumner, William Graham. Andrew Jackson: American Statesmen. (Houghton Mifflin, 1897) 5

Schulkind, Laura. "Applying the Necessity Defense to Civil Disobedience Cases," 65 New York University Law Review, 79 (1989) 12

OPINIONS BELOW

The U.S. Court of Appeals ruling on Motion for Reconsideration is reproduced at Appendix A (p. 1a); the U.S. Court of Appeals ruling on Certificate of Appealability is reproduced at Appendix B (p. 3a); the U.S. Court of Appeals Certified Copy of Order Denying COA is reproduced at Appendix C (p. 4a); the U.S. District Court Ruling on Petition of Writ of Habeas Corpus is reproduced at Appendix D (p. 6a); the U.S. District Court Order Accepting Petition for Writ of Habeas Corpus is reproduce at Appendix E (p. 19); the Supreme Court of Florida Dismissal of Petition for Review is reproduced at Appendix F (p. 23); and the Supreme Court of Florida Acknowledgement of New Case is reproduced at Appendix G (p. 24)

JURISDICTION

Motion seeking a Certificate of Appealability from the U.S. Court of Appeals, Eleventh Circuit, denied, No. 07-11786-H, 18 June 2007. Originally submitted to court, 22 May 2007.

Certificate of Appealability denied by U.S. District Court Judge Steven D. Merryday, Middle District of Florida, Tampa Division, No. 8:06-cv-1887-T-23TGW, 7 May 2007.

Petition for writ of habeas corpus and a summary judgment denied, U.S. District Court Judge Steven D. Merryday, Middle District of Florida, Tampa Division, No. 8:06-cv-1887-T-23TGW, 21 March 2007.

Petition for writ of habeas corpus as well as motion for temporary injunction filed by petitioner in U.S. District Court, Middle District of Florida (Tampa), No. 8:06-cv-01887-SDM-TGW, 13 October 2006.

Petition for Review dismissed, Supreme Court of Florida, No. SC06-1742, 12 September 2006.

Appeal before Florida Second District Court of Appeals, No. 2D04-5375, per curiam affirmed, 18 August 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9 states that the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion the public safety; may require it. Since neither rebellion or invasion occurred in 1996 when the Anti-Terrorism and Death Penalty Act was passed (nor do the limited attacks of September 11, 2001, constitute an invasion) the federal government is denied the right to restrict the privilege of the writ of habeas corpus, especially to a U.S. citizen who is not in rebellion, and cannot invade his own nation.

Article VI states "This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby..." Clearly the Constitution trumps the AEDPA.

Amendment I states Congress shall make no law...abridging the freedom of speech...and to petition the government for a redress of grievances. By not permitting the juror's sworn affidavit to be given its due weight and not allowing the juror's refusing to follow the judge's written instructions as well as ignoring his promise during voir dire to give equal weight to a law enforcement officer's testimony and a civilian's, petitioner's freedom of speech and to petition his local government regarding its 82-year tradition of demeaning American Indian culture and spirituality was abridged and all meaningful dissent ended in his community.

Amendments V and XIV state that no person shall be deprived of life, liberty or property without due process of law... By being denied presenting a necessity defense and denied access to evidence by the prosecutor revealed in discovery, by the judge arbitrarily dismissing the first chosen jury resulting in the choosing of the juror who broke the law, petitioner was denied due process, including his right to a full and vigorous defense.

Amendment VIII states that no cruel and unusual punishments be inflicted. The 484 hours of community service in 90 days imposed by the trial judge was harsh and excessive by local standards, and the trial judge ignored the investigating case officer's recommendation that any jail time was inappropriate for this defendant.

Amendment IX states that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people..." Petitioner was denied his right to a full and vigorous defense by not being allowed to present

a Necessity Defense in a case involving civil disobedience, and a likelihood that such a defense would have led to an acquittal even in this community.

Amendment X states "The powers not delegated to the U.S. by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people." If any power should be reserved to the people, it is their right to present the Necessity Defense, a defense based on morals, ethics, and a higher natural law. A crime is a crime only if done with malice aforethought, or knowingly and intentionally. The felony charge of injuring a law enforcement officer occurred without the knowledge and intent of the petitioner, a former law enforcement officer himself, and a former officer in both the U.S. Marine Corps and U.S. Special Forces, whose sons are both in the military and law enforcement.

Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482, 116 L.Ed 2d 385 (1991) cited by the U. S. Court of Appeals, 11th Circuit after concluding that the "Appellant has failed to make a substantial showing of the denial of a constitutional right," seems to concern itself with an appellant who had a record of prior acts pertaining to the offense charged—not applicable to the petitioner's appeal. It is not the province of a federal habeas corpus petition to re-examine state court determinations on state law issues. While the Florida Constitution does offer individual protections as the U.S. Constitution does, this petition is based on the appellate courts ignoring the deprivation of constitutional protections guaranteed to U.S. citizens that in this instance have been ignored in both state and federal courts to

date. True, the Constitution attached qualifications upon the privilege of the writ of habeas corpus saying it "shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require." Petitioner believes that the so-called war on terrorism constitutes neither rebellion nor invasion, and as numerous appeals on this issue show, never has the writ of habeas corpus been more needed, for those imprisoned both guilty and not guilty, fairly or unfairly. If a state court can defend its denial to the appellant and to Jose Padilla in the same document as the AEDPA, if a former captain who served in both the U.S. Marine Corps and U.S. Special Forces with a man accused of volunteering to plant a dirty bomb in our nation, clearly the District Court's denial of Petitioner's petition for a writ of habeas corpus is too broad and too harsh. To paraphrase a scholar, our judicial system is based on saving the individual who is innocent while freeing the 99 guilty, not to condemn all 100 rather than risk the guilty being freed.

As will be shown in this writ of certiorari, this appellant was found guilty of touching a law enforcement officer, not physically attacking him during an act of civil disobedience, only because Petitioner was denied offering a Necessity Defense, and because a juror broke the law. As William Graham Sumner wrote in Andrew Jackson: American Statesmen (published by Houghton Mifflin, 1897), "A constitution is to a nation what self-control under established rules of conduct is to a man. The only time when it is of value is just the time when the temptation to violate it is strong, and that is the time that contravenes temporary and party interests."

The Court of Appeals also cited Mathews v. U.S., 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988) in concluding that the "appellant has failed to make a substantial showing of the denial of a constitutional right." This case refers to a defendant's right to raise an entrapment defense when the District Court denied the petitioner's pre-trial motion, ruling that entrapment was not available because the petitioner would not admit to all of the elements of the offense. In Petitioner's case, with the Court of Appeals denying the Certificate of Appealability, this citation seems to support one of the issues that Petitioner raises and has raised in every state and federal court: that despite Petitioner's denial of having knowingly and intentionally injured a law enforcement officer, however slight the wound, that Petitioner remains entitled to present a Necessity Defense at his original trial, that such a defense was appropriate and allowed in that case, and that the trial judge's denial of that defense denied Petitioner the right to a full and vigorous defense for his act of civil disobedience, a defense that would likely have resulted in Petitioner's acquittal, or a new trial.

If the petitioner in this case cited is "entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment," surely in a case involving civil disobedience against an 82-year tradition of exploiting American Indian culture and spirituality while using taxpayer funds is the kind of case for which a Necessity Defense is both required and appropriate.

A third case cited by the U.S. Court of Appeals in their denial of the Certificate of Appealability and

their conclusion that Petitioner failed to make a showing of being denied a constitutional right, is Tanner v. U.S., 483 U.S. 107, 119, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90 (1987), perhaps because it seems to address the Petitioner's issue that a sworn affidavit from one of his jurors raises serious questions of juror misconduct. The response from Judges Dubina and Hull seems to be that Tanner v. U.S. shows that jurors are aware of being second-guessed or impeached if they are drunk, high on marijuana, or sleep during a trial.

Petitioner's contention is that jurors may be allowed to be mentally incapacitated or stupid, but they are not permitted to break the law. Had the Court of Appeals granted my motion for a Certificate of Appealability they would have read that the juror Christine Goracio and four others were coerced by one juror to break their oath during voir dire to give a law enforcement officer's testimony the same weight as any other person testifying, no more or no less. The sworn affidavit clearly shows that the one juror made the judge's written instructions regarding lesser offenses null and void by his contention that he, not the judge, understood the pertinent law, and that just touching a law enforcement officer constitutes battery.

The tradition that to question a jury's decision undermines the entire system of American jurisprudence is only true if one accepts that totally antithetical belief that the justice system must tolerate the occasional conviction of the innocent rather than putting any restraints on jurors. A juror is not above the law, and neither is a jury when it inhibits, distorts or perverts the law placed in its hand. Then that juror and that jury must be called

to task. The American system of law will not fall, or falter, when this occurs.

The fourth case mentioned by the Court of Appeal in its denial of the Certificate of Appealability is Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). This case deals with a petition for a writ of certiorari from a petitioner seeking a stay of execution for a capital offense. Justice Powell granted this writ for a stay of execution not because the writ had any merit, but because a person's life was at stake and it was deemed impossible to assemble the Supreme Court to consider the matter en banc. Chief Justice Berger dissented, stating "we abuse our discretion when we accept meritless petitioners presenting claims that we rejected only hours ago."

Frankly, Petitioner does not understand why the U.S. Court of Appeals cited this case in their denial of the Certificate of Appealability. Should Petitioner infer that since his life is not at stake—only his freedom—that no certificate or writ is acceptable. Or is it that a meritless claim should be heard only when a life is at stake, and a claim with merit never?

Though the charges I faced could have imprisoned me for more than six years and the trial court judge sentenced me only to 30 days in county jail, plus 484 hours of community service in 90 days, and 18 months of probation, that sentence was considered excessive by the Probation Department, and unusual considering my age (62), my lack of a prior criminal record, my military service in both Vietnam and in quelling the riot at Attica State Prison in 1971, my 28 years of teaching high school English, my previous acts of civil disobedience with no violence,

and hundreds of hours of community service teaching beginning English to newly-arrived immigrants, heading the Society of Citizens Against Racism (SCAR), helping to found a new chapter of the NAACP in our county, being Head Librarian at the West Pasco Historical Society, offering conflict-dispute resolution at two local high schools when the Confederate flag was put up to intimidate minority students, assisting individuals and representing them in job-related disputes, and as Social Justice chairperson and editor at the Unitarian-Universalist Church of Tarpon Springs.

In the fifth case cited by the U.S. Court of Appeals in their denial of the Certificate of Appealability, they cited Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) which states "...an issue not raised in district court and raised for the first time in an appeal will not be considered in this court." The Supreme Court should not allow this citation to taint my writ. It applies only to my contention in my appeal that a statement made by the respondent, State of Florida, to the U.S. District Court contended that Petitioner should not have gone into the street, endangering himself and others, because other means of protest exist. Petitioner asked the District Court to allow him to submit a day-by-day accounting of three years of protesting to show that going into the street was the last of many efforts. Secondly, statements from both the State Attorney General's office and the District Court Judge Merryday show that one could conclude indirectly, that the Petitioner's two trial attorneys showed gross incompetency that can only be remedied by a new trial. It is true that to date, Petitioner has not pursued this issue in state court, though it remains a distinct possibility. Petitioner asks the Supreme

Court, therefore, to ignore this mentioning of attorney incompetence, however indirectly the District Court alluded to the matter.

In the sixth case cited by the U.S. Court of Appeals in their denial of Petitioner's request for a Certificate of Appealability, Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985), the key issue seems to be that "Even if the weight of the evidence is overwhelming in favor of the state charge, the defendant is entitled to an instruction on a lesser offense..." In Petitioner's trial, although the judge included a lesser charge to the most serious crime, a juror wantonly construed that the lesser offense was not lawful since touching a law enforcement officer constitutes a crime. Surely if a defendant is entitled to an instruction on a lesser charge, he should also be entitled to such a lesser charge being considered on its merits, not arbitrarily dismissed by a single juror.

In Lockyer v. Andrade, No. 01-1127, decided by the U.S. Supreme Court in 2003, the AEDPA does not require a federal habeas corpus to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of clearly established federal law. First, the court must decide what constitutes such "clearly established" law. To apply AEDPA in this Petitioner's case is the equivalent of smashing a fly with a nuclear bomb. If a writ of habeas corpus is not available to a defendant with his background of service to his community and his country, then who in legal hell is eligible for this ancient, revered, basic right?

In each of his appearances in state and federal court to date, the Petitioner has raised the issue of infringement of his rights under both the Florida and U.S. Constitution. The Supreme Court of the United States for over a century "has concluded that a number of procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment. (See Mapp v. Ohio, 367 U.S. 643 (1961) overturning Wolf v. Colorado, 338 U.S. 25 (1949), Malloy v. Hogan, 378 U.S. 1 (1964) overturning Twining v. New Jersey, 211 U.S. 78 (1908), Benton v. Maryland, 395 U.S. 784 (1969) overturning Palko v. Connecticut, 302 U.S. 319 (1937), Gideon v. Wainwright, 372 U.S. 335 (1963), Washington v. Texas, 388 U.S. 14 (1967), Duncan v. Louisiana, 391 U.S. 145 (1968).

Although the federal courts do not seem to have settled law regarding the Necessity Defense, it seems clear that during the trial that both Judge Michael Andrews and Defense Attorney Steven Bartlett knew little of case law. Judge Andrews, in the excerpts from trial record included, believed that the Necessity Defense and the concept of Self-Defense are one in the same, so that permission to present the former could only be given if Petitioner's actions involved a life or death matter. The case law presented by Attorney Bartlett involved a murder case in which a man killed a person providing security at an abortion clinic, although the federal judge in that instance did not use life and death terms in listing the requisite elements of the Necessity Defense. Following are cases that the Petitioner discovered since his trial that clearly show why a Necessity Defense was completely appropriate in this case, and why the Petitioner was denied a fair trial by not being allowed to present such a defense.

In U.S. v. Val Fillenwarth, No. 4:06-pu-00038GMF, the crime involved a violation of federal law by unlawful trespass at the School of Americas located at Fort Benning, Georgia, a situation somewhat similar to the Petitioner's case before you. In Armstrong v. Manzo, 380 U.S. 545 (1965) it was argued that "The basic constitutional right (is) to put on a full defense..." Attorney Laura Schulkind wrote an extensive essay entitled "Applying the Necessity Defense to Civil Disobedience Cases," 65 New York University Law Review, 79, 83 (1989). The numerous cases cited in this article are not enumerated here, but a copy of this essay can be provided if the justices wish to read it. On page 92 Schulkind writes, "Even if these defendants are before a judge who does not believe that a history of futile attempts constitute a no-legal-alternative situation, due process entitles them to jury consideration of whether their belief in the futility of legal action was reasonable and whether this established a reasonable belief that no legal alternative existed."

In U.S. v. Duclos, 214 F.3d 27 at 33 (1st Cir., 2000) it states, "The U.S. Supreme Court has left open whether a justification defense (sometimes referred to as a Necessity Defense) should be allowed where not specifically recognized by statute. See also U.S. v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 490 (2001). (For the record at age 64 I have yet to smoke marijuana, although I assisted an Ohio state prosecutor in gathering evidence on a drug ring operating under the guise of a rock concert site in North Baltimore.)

In U.S. v. Greenpeace, USDC, So. District of Florida Middle Division, Miami, Case No. 03-20577,

also pertains to this case and the use of a Necessity Defense. In J. Hall's General Principles of Criminal Law, p. 416 (2d edition, 1960), he states "This defense like other justification defenses, allows a defendant to evade responsibility for otherwise criminal actions notwithstanding proof of the elements of the offense."

In U.S. v. Hill, F. Supp. 1044 (N.D. Fla. 1994) it states "Defendants have the right to present evidence to support the defense of necessity...evidence that defendant exhausted all available legal alternatives...that such alternatives as a class had been futile might be sufficient to allow defendant to present his necessity defense to the jury."

In U.S. v. Opdahl, 930 F.2d 1530, 1535 (11th Cir. 1991) it states "Criminal defendants are entitled to present any legal defense which has any foundation in the evidence even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

In U.S. v. Bailey, 444 U.S. 394, 1005 S.Ct. 624, 62 L.Ed.2d 575, at 635 (1980) it states, "The Supreme Court has not endorsed any of these specific approaches to necessity as the proper formulation of the defense in federal courts." This would seem to indicate this is unsettled law, allowing for the widest latitude of use at county and state trial levels.

According to the Model Penal Code, Sec. 3.02, the defense of necessity is defined as follows: Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: The harm or evil sought to be avoided

by such conduct is greater than sought to be prevented by the law defining the offense charged; neither the code or other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

In Petitioner's case, after three years of seeking meetings with public officials and private leaders at every local level, writing letters to governing public officials at every level concerning civil rights violations and misuse of public funds, of finding and supporting candidates at the city and county levels to oppose those supporting the exploiting of American Indian culture and spirituality, of starting a non-profit Society of Citizens Against Racism (SCAR), speaking before churches and synagogues, protesting at parades and places of businesses of the Krewe of Chasco, of lawsuits against two mayors and other civic leaders, and other legal efforts seeking injunctions, and many other actions outlined in a written record including four women members stepping into the street ahead of the float in 2003 and being arrested, Petitioner chained himself to the roadway, only after efforts for an injunction failed and activist Russell Means failed to show up. Petitioner did not knowingly and deliberately injure anyone, perhaps because my linen sling lay across my attached hand, obscuring the view. (My attorney and I were denied access to the pipe, the sling and the photos at the police station.)

In U.S. v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) a somewhat different list of elements to those shown above include the following: An Actor acted to avoid a significant evil; there are not adequate legal

means to escape the evil; and Remedy is not disproportionate to the evil sought to be avoided. In this case, if Petitioner had been allowed to present a Necessity Defense, he could easily have demonstrated a now 85-year tradition of exploiting and demeaning American Indians in New Port Richey, despite adding a Native American pow-wow in recent years. (Former mayor and county commissioner chairperson Peter Altman calls them "his Indians" as opposed to SCAR members who are Indians.) Petitioner could have shown the many legal and non-violent efforts made to correct this evil, which had already led to the ending of the Chasco Pageant in its 82nd year, in which children dressed as Indians made stabbing motions in the chests of prone children dressed as Spaniards, in which Christianity and white European culture is shown as better than that of American Indians' beliefs. If allowed the Necessity Defense, the Petitioner could have demonstrated that the simple remedy for the city of New Port Richey and Pasco County is to stop using public funds to rent the float for the Krewe of Chasco, a private club of white business and civic leaders, who in turn rent a Seminole named Billy Henry as their token Indian—for $5,000. Perhaps the city attorneys could apologize then to this Petitioner for their lawsuit to compel him to pay $28,000 in legal fees for their defending the mayor for refusing to release documentation of taxpayer money spent on the float.

Petitioner believes but cannot prove that the state trooper who received a tiny cut to the web between his right thumb and index finger that he treated himself at the scene with finger pressure (and that did not leave a scar as claimed by the prosecutor in his closing statement) was urged by local police

officers and city officials to make the charge a felony and not a misdemeanor to end his years of very public protesting. (Oddly, with 100,000 spectators at the parade, Deputy Mayor Tom Finn who is a member of the Krewe of Chasco, was present when I was placed in chains into the police van. Also, Petitioner's request for a copy of the membership of the Krewe of Chasco to screen jurors and witnesses was denied.)

In 18 U.S.C. § 1382, it states that proof of individual criminal intent is required. In U.S. v. Dorrell, 785 F.2d 427 (9th Cir. 1985) it states "...evidence supporting the defense of necessity should be evaluated by the court to see if it is sufficient as a matter of law to support the proposed defense."

Finally, regarding not being allowed to present the Necessity Defense as Petitioner wished, in U.S. v. Gant, 691 F.2d 1159 at 1164 (5th Cir. 1982) the "Courts have found where legal alternatives are futile or illusory, they are not legal alternative." For example, in the months leading up to the March Chasco Fiesta parade, numerous attempts were made to have our pro bono attorney in Coral Gables present a timely and proper motion seeking a temporary injunction against the Krewe of Chasco appearing in the parade, but the attorney procrastinated, then claimed to have mailed it, then informed an officer of SCAR that he could sign a document in lieu of the attorney's signature, resulting in the county judge angrily tossing out the motion just days before the event took place. Clearly any hope of legal relief from this attorney was both futile and illusory, but not through Petitioner's fault.

Regarding the issue of prosecutorial misconduct raised in both state and federal courts, how is it appropriate or necessary for a prosecutor in his closing statement to state the injured officer was "scarred" when such was not the case, nor was any evidence shown—indeed, to the contrary, the trooper said his injury caused no lasting harm at all, nor did he lose a minute of work time, while the officers who pulled on Petitioner's attached arm caused a loss of sensation to his right thumb and index finger for the next six months, as well as initial bruises. Asking one of the several police officers relying on a written report filed by an officer not present at the event whether Petitioner was guilty as charged was inappropriate, and clearly went against the prosecutor asking the jury pool to not lend special weight to a police officer's statement any more than any other citizen. In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), it states, "And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, (to be) the chosen forum for ascertaining the truth about criminal accusations." See also Rose v. Clark, 478 U.S. 570, 577-58 (1974), Estes v. Texas, 381 U.S. 532, 540 (1965), U.S. v. Leon, 468 U.S. 897, 900-901 (1984).

In Alderman v. U.S., 394 U.S. 165, 175 (1969) it states "Criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth." In the comments mentioned above and in the appeal to the Florida Supreme Court, the prosecutor lied and manipulated the legal process so that his distortions of the truth could not be questioned or examined in the light of the facts. Thus, the Petitioner was denied due process guaranteed by both the Florida State Constitution

and the Constitution of the United States, and he deserves a new trial. See also U.S. v. Williams, 504 U.S. 36 (1992) and Berger v. U.S., 295 U.S. (1935).

Finally, regarding the issue of prosecutorial misconduct, in Brady v. Maryland, 373 U.S. 83 (1963) as in Mooney v. Holohan, 394 U.S. 103 (1935), "The principles of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair, our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in the courts."

STATEMENT OF THE CASE

On 20 March 2004, petitioner Daniel Callaghan, president of the non-profit Society of Citizens Against Racism (SCAR), culminated three years of non-violent protesting against New Port Richey's 82-year tradition of exploiting American Indian culture and spirituality to advertise an 11-day food fest and carnival called the Chasco Fiesta. He did so by entering the street ahead of a float SCAR believed offensive and chaining himself to the roadway, stopping the float and the Chasco parade. New Port Richey and Pasco County as well as the local chamber of commerce pay $21,000, two-thirds of its taxpayer money to rent the float for a private club called the Krewe of Chasco, 150-200 white civic and business leaders who dress up in authentic Indian

regalia, then shake their buckskinned assets in nine regional parades. They are the only krewe in Florida based on an ethnic minority that has no members of that minority—Peter Matthiessen and Russell Means have criticized it as the worst insult to American Indians in the United States today.

In 2001, after we sued Mayor Wendy Brenner, West Pasco Chamber of Commerce president Joe Alpine and Junior Service League leader Sissy Passarella, the city ended the Chasco Pageant, the opening event of the Chasco Fiesta after 81 annual performances. In that pageant Calusa Indians were called pagans, heathens and savages, accused of human sacrifice to a fictitious god, and its happy ending was when the Calusas choose to be led by two white children they spared, King Pithla and Queen Chasco, and convert to Christianity. And why are there no Calusas alive today? According to the Chasco Fiesta brochure, after the death of their benevolent white rulers, the Calusas reverted to human sacrifice, so God destroyed them all with hurricanes. The city also ended events in the Children's Indian Village in which children would pick the pocket of the Drunken Injun, and search for hidden treasures in miniature Indian burial mounds in a big sandbox. After ending those events, SCAR sued a second mayor, Frank Parker, to get public release of taxpayer funds spent supporting the Krewe of Chasco and the Chasco Fiesta. On 20 March 2004, after a county judge refused to recuse himself and ruled against our emergency motion to stop the Krewe of Chasco float (the judge previously was made King Pithla—honorary king of the Chasco Fiesta), the petitioner stepped into the street, his right arm encased in pvc pipe with the edges filed down to prevent injury, and attached himself to an

eyebolt in the street with thin cable and a metal carbariner. New Port Richey police were notified not to quickly remove me from the road because of the possibility of harming the protestor—copies were given to the headquarters and two policemen at the parade.

In minutes 19 law enforcement officers surrounded Callaghan, and at the order of Chief of Police Rickus to get him up, four officers from three jurisdictions grabbed Callaghan and tried to pull him up, causing nerve damage to his attached right thumb. One officer, Florida Trooper Sergeant Medill, received a very tiny cut on the web between his right thumb and index finger, which he treated at the scene with pressure from his other hand. According to his testimony at trial (Vol. IV, T211):

> Q. But your eyes were more toward the ground, not what's going on up above?
>
> A. Yeah, I was looking at the pipe.
>
> Q. So you don't know. All you know is that the pipe came down. You don't know why the pipe came down? It's possible, from what you saw, that the officers were pushing him down from above, and that is why the pipe came down?
>
> A. I'm not sure.

Callaghan was charged with the following crimes: Battery on a law enforcement officer, a third-degree

felony in violation of section 784.07 and 784.03 of Florida statutes (Count 1); Disturbing a lawful assembly, a second-degree misdemeanor, contrary to section 871.01, Florida statutes (Count II); Obstruction of Highway, first-degree misdemeanor, in violation of section 861.01, Florida statutes (Count III); and Disorderly Conduct, a second-degree misdemeanor, contrary to section 877.03, Florida statutes (Count IV).

During the trial New Port Richey police officer Robert Close testified that he arrived at the scene of someone blocking the roadway to find two state troopers telling the petitioner to unhook himself. (Officer Close actually was the first officer on the scene, saying "Don't do it" as I slipped the metal clasp over the eyebolt.) Officer Close stated he did not know whether the petitioner was intentionally leaning forward or whether it was a reflexive response to pain when his left arm was twisted behind him. On cross-examination, Officer Close acknowledged that his testimony was refreshed by a police report written by others. In his own written report at the time of the incident, Officer Close never wrote that he observed any battery on a law enforcement officer, or how Sgt. Medill was hurt.

Two civilians testified that they never saw Callaghan hit, kick, throw any punches or do anything violent, nor did he yell or make any other comments. One of the two had previously served in the jury pool chosen for petitioner's trial.

Police officer Greg Williams who wrote the police report used by others, arrived at the scene only after petitioner had been detached and taken into custody. His report was based on the testimony of others as to

what happened. The one law enforcement officer who says Callaghan deliberately injured Sgt. Medill is Florida Trooper Ricardo Valdez. He stated that the combined efforts to lift Callaghan failed, but that Callaghan kept resisting by intentionally using his left hand to push the pipe down onto Sgt. Medill's hand. (Traffic Court justice Constantin Kalogianis was willing to testify for the defense that he told Trooper Valdez not to bring cases to his court because he was an inveterate liar, but Defense Attorney Steven Bartlett declined to have him testify). Trooper Valdez did not explain how repeated blows caused only one tiny injury to Sgt. Medill.

Sgt. Medill stated that Callaghan refused to comply with orders to unhook himself from the road. (V4: T198-203) He said that when the two state troopers tried to effect an arrest, Callaghan tried to stop the officers from gaining control of him and would jam the pvc pipe down on the ground whenever Sgt. Medill tried to remove the cable from the ring beneath the pipe. He acknowledged, however, he was not sure whether Callaghan's pushing down was intentional or the result of one of the other officers pushing it down from above him. During the incident, Sgt. Medill testified that Callaghan did not curse the officers, or make any threats, nor did he seem angry or enraged. (V4: T219)

Testifying on Callaghan's behalf, Terry Kline, president of the West Pasco Historical Society, stated that he saw Callaghan handing out fliers to the crowd before the incident urging spectators to turn their backs when the Krewe of Chasco float came by, and that he had for years guided people in the Florida American Indian Movement from more

violent acts at the Chasco Fiesta and its parade. (V4: T233-235, 238-241, 252) (Callaghan was the first non-Indian recipient of the David Goyette Humanitarian Memorial Award from AIM.)

James Wright, a member of SCAR, testified Callaghan never called for any type of violent protest nor engaged in any. (V4: T251-253, 278-279) Jim Wright was present during Callaghan's fastening himself and subsequent arrest, and took a series of photos over the shoulders of the arresting officers. Wright testified that Callaghan could not move as the police had his left arm behind his back and the other hand was chained to the roadway. Callaghan's only movement came from the police officers pulling him even though he could not move. (V4: T261-263, 272-274) Wright never saw any officer with his hands pinned to the ground by the pipe, nor did Callaghan resist in any way. (V4: T264, 272)

Callaghan testified that he hoped by stopping the Krewe of Chasco float to draw attention to it, and that some people are deeply offended by their activities. (V5: T286-293, 300, 308, 315) He believed that allowing the Krewe to go unchallenged insulted the 187 children of American Indian ancestry in Pasco schools, and that it continued a form of racism started in 1922 of stereotypes that the community would not accept toward any other racial or ethnic group. Callaghan did not believe in violent protests under any circumstances, and was merely trying to be civilly disobedient, as he learned from the activities of Martin Luther King Jr. and others. (V5: T291-296, 298-300, 305) Callaghan testified he would never—nor did he—intentionally hurt Sgt. Medill. He did not resist when the officers arrived and began pulling him out of the roadway, then

detaching him with boltcutters, and he never saw or heard any officer get injured. (V5: T301-305, 310-311, 316, 319-323) (Judge Michael Andrews twice removed the jury from the room and chastised Callaghan for displaying SCAR banners and signs, and for mentioning news articles in which the president of the Krewe of Chasco called for members of the Chamber of Commerce to buy guns and kill AIM members—he would bury them for free at his funeral home.)

Based largely on the testimony of only one witness, Trooper Valdez, Judge Michael Andrews denied petitioner's renewed motion for acquittal. After the jury was charged, Callaghan renewed his motions for a judgment of acquittal and objected to the jury instructions. The jury returned a verdict finding petitioner guilty of all crimes as charged. Judge Andrews reserved sentencing until a pre-sentence investigation report could be obtained. On 4 October 2004 and 7 October 2007, petitioner filed a motion for a new trial. After conducting a hearing on 26 October 2004, Judge Andrews denied the motion and sentenced the petitioner to a month in county jail, 18 months of probation, and 484 hours of community service to be completed in 90 days.

After months of delay receiving the trial record, an appeal was filed in the District Court of Appeals of Florida, Second District, raising the following issues: Issue 1—that The Trial Court erred in not conducting a proper evidentiary hearing on appellant's claim of juror misconduct; Issue II—that Reversal for a New Trial is warranted based upon prosecutorial misconduct which denied appellant a fair trial; and Issue III—that The Trial Court erred in Failing to Properly Instruct the Jury on

Appellant's Theory of (Necessity) Defense. In response, the state appellate court issued a per curiam decision, and issued its Mandate dated on 10 October 2006.

Petitioner had filed on 25 August 2006 in the Supreme Court of Florida the following: a Notice to Invoke Discretionary Jurisdiction; Petitioner's Brief, and an Emergency Motion for a Stay. Included were concerns regarding violations of both the Florida State Constitution and the U.S. Constitution. On 12 September 2006, the Supreme Court issued its decision, stating that "It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed."

Petitioner then asked the U.S. District Court to grant him a writ of habeas corpus and because of distortions in the response from the State of Florida that petitioner could have engaged in other means of protesting, to allow him to submit a detailed log of non-violent protesting for three years to show that the Petitioner's actions by stopping the float was the last effort after years of seeking to alter the behavior of the city of New Port Richey by letters to politicians and organizations, protesting at the businesses of the Krewe of Chasco, finding and supporting candidates who would end support of the Krewe and opposing those who support them, lawsuits, speeches at churches and synagogues, and many other activities. When the District Court denied Petitioner's motions, Petitioner then asked for a certificate of appealability which was denied as well. Subsequently, Petitioner asked the U.S. Court of Appeals to issue a certificate of appealability and when that was denied, for the Court en banc to reconsider, which they also denied. Hence, this writ

of certiorari to the court of last resort, the U.S. Supreme Court.

REASONS FOR GRANTING THE PETITION

The Supreme Court justices have the opportunity to use this pro se case to make a strong statement that despite external threats to this nation, we still have a living Constitution strong enough to keep intact individual rights, including the writ of habeas corpus and due process. American jurisprudence follows the spirit of Jesus' teaching that rather than lose the one lost sheep, he will leave the 99 to save the one. In a like manner, our system would sooner free 99 guilty men then imprison one who is innocent.

Despite petitioner being found guilty of injuring a police officer during a protest, the truth is that the petitioner did not knowingly or intentionally cause that injury, and had the jury not reflected the city's support of 82 years of demeaning American Indian culture and spirituality, and widespread anger of those protesting that, they would have heeded the judge's jury instructions regarding lesser charges. Clearly, had I not entered the roadway, the police officer would not have been injured at all—a fact I made clear in my letter of apology to him. (A copy is available.)

Had petitioner been permitted to use a Necessity Defense he could have demonstrated the moral imperative for him to stop that float, and thereby stop the parade, even if just for minutes. The Supreme Court has the opportunity to consider such a defense being appropriate in these days, and of

being acknowledged in local, state and federal courts, as appealing to a higher more personal law. Justice Abe Fortas, on the other hand, believed that breaking any law including by civil disobedience is still breaking the law, and the breaker should be willing to accept the consequences. However, when local philosophies are inflamed by protest, and a felony is added to what should have been misdemeanors, then the law is being misused.

While it is necessary that jurors and their deliberations should be especially protected from questioning afterward, that is less acceptable when jurors are using alcohol, or marijuana or stupidity. What is not acceptable is when one juror breaks the law himself, by violating his oath during voir dire to treat all witnesses equally, and substituting his interpretation of the law: Thou shalt not touch a police officer—for the judge's considered jury instructions that included lesser offenses. The fact that one juror had the courage to speak up, however late, will not undermine or disrupt the jury system in the United States—to act as though she didn't step forward is to deny her courage as well as the opportunity to set things right.

CONCLUSION

Wherefore, the Petitioner, Daniel Callaghan, Pro Se, further prays that a writ of certiorari be granted.

Respectfully submitted,

Daniel Callaghan, Pro Se
7108 Daggett Terrace
New Port Richey, FL 34655
(727) 372-1742

Date: 28 December 2007

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11786-H

D.J. CALLAGHAN, JR.,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

Before **DUBINA and HULL, Circuit Judges.**

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated June 18, 2007, denying his motion for a certificate of appealability. Upon reconsideration, appellant's motion for a certificate

of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991); Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988); Tanner v. United States, 483 U.S. 107, 119, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90 (1986); Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986); Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994); Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985).

(Note: Stamped Received Oct. 26, 2007)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11786-H

D. J. CALLAGHAN, JR.,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX C

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

June 18, 2007

Sheryl L. Loesch
Clerk, U.S. District Court
801 N FLORIDA AVE RM 220
TAMPA FL 33602-3849

Appeal Number: 07-11786-H
Case Style: D.J. Callaghan, Jr. v. State of Florida
District Court Number: 06-01887 CV-T-23TGW

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Also enclosed is the record on appeal, which consists of:

ONE VOLUME AND TWO FOLDERS

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Liz McDonald
(404) 335-6187

APPENDIX D

Case 8:06-cv-01887-SDM-TGW Document 14

Filed 03/21/2007 Page 1 of 11

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DANIEL CALLAGHAN,
Petitioner,

v. Case No. 8:06-cv-1887-T-23TGW

STATE OF FLORIDA,
Respondent.
_____/

ORDER

Callaghan petitions for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) and challenges his conviction for, inter alia, battery on a law enforcement officer, for which he was sentenced to thirty days in the county jail, probation, and community service. The response (Doc. 10) to the petition is supported by numerous exhibits ("Respondent's Exhibit"). The respondent does not challenge the timeliness of the petition. Having considered the arguments of the parties and reviewed the record, this court concludes that the petition is meritless.

FACTS

To protest a float he found offensive and disrespectful to Native Americans, Callaghan chained himself (specifically, his hand) to the roadway during the Chasco Fiesta parade in New Port Richey. In an effort to end Callaghan's disruption of the parade, a police officer attempted to unlock Callaghan's chain from the roadway, but the officer injured his hand in the resulting struggle.

STANDARD OF REVIEW

Because this action commenced after April 24, 1996, Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), governs this proceeding. Wilcox v. Florida Dep't of Corrections, 158 F.3d 1209, 1210 (11th Cir. 1998), cert. denied, 531 U.S. 840 (2000). Section 2254(d), which creates a highly deferential standard for federal court review of state court adjudications, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams v. Taylor, 529 U.S. 362, 412-13 (2000), the Supreme Court interpreted this deferential standard:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to...clearly established Federal Law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of...clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.
>
> Moreover, "[t]he focus...is on whether the state court's application of clearly established federal law is objectively unreasonable, ... an unreasonable

application is different from an incorrect one." Bell v. Cone, 535 U.S. 685, 694 (2002). Accord Brown v. Head, 272 F.3d 1308, 1313 (11th Cir. 2001) ("It is the objective reasonableness, not the correctness per se, of the state court decision that we are to decide.").

Callaghan's convictions and sentences were affirmed on direct appeal in a per curiam decision without a written opinion (Respondent's Exhibit 3). Callaghan has the burden of overcoming all state court factual determinations by clear and convincing evidence. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies only to findings of fact, not mixed determinations of law and fact. Parker v. Head, 244 F.3d 831, 836 (11th Cir.), cert. denied, 534 U.S. 1046 (2001). However, because Callaghan's convictions and sentences were affirmed on direct appeal without a written opinion, there are no findings of fact to which this court can defer. Nevertheless, the state appellate court's per curiam affirmance warrants deference under Section 2254(d)(1) because "the summary nature of a state court's decision does not lessen the deference that is due." Wright v. Moore, 278 F.3d 1245, 1254 (11th Cir.), reh'g and reh'g en banc denied, 278 F.3d 1245 (2002), cert. denied sub nom Wright v. Crosby, 538 U.S. 906 (2003).

As stated above, Callaghan must prove that the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2)...based

on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Ground One:

Callaghan alleges that in reaching their verdicts the jurors misinterpreted and ignored the jury instructions on the elements of both battery on a law enforcement officer and the lesser included offenses. The basis for this claim is an affidavit from a juror in which she stated that she acquiesced to voting guilty even though she had a reasonable doubt about Callaghan's guilt.

As a general principle, jury deliberations are protected from impeachment so that jurors can have "full and frank" discussions.

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingless to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a

> barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120-21 (1987) (citations omitted). Florida law precludes delving into the thought processes and discussions between jurors in their attempt to reach a verdict. Devoney v. State, 717 So.2d 501, 502 (Fla. 1998) (an "affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."). The same preclusion applies in federal law. See Rule 606 (b), Fed. R. Evi. ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith..."). Consequently, Callaghan cannot show that the state court's rejection of this claim was contrary to or an unreasonable application of controlling Supreme Court precedent.

Ground Two:

Callaghan presents four claims of prosecutorial misconduct, none of which is reviewable on the merits due to procedural problems. The first two claims, that the prosecutor asked a witness to give

an opinion on Callaghan's guilt and the prosecutor's improper statements during closing argument, are procedurally defaulted because trial counsel failed to object during trial.

The state opposed these two grounds on direct appeal by arguing that the claims were not preserved by a contemporaneous objection (Respondent's Exhibit 2 at 13). The state appellate court affirmed the conviction in a per curiam decision without a written opinion (Respondent's Exhibit 3). Generally, before a claim is procedurally barred from federal review, a state court must reject reviewing the incorrectly presented claim.

> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: "The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."

Harris v. Reed, 489 U.S. 255, 262 (1989), quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985). But because the appellate court did not issue a written opinion, the record fails to contain "a `plain statement' that [the state court's] decision rests upon adequate and independent state grounds." Harris v. Reed, 489 U.S. at 261, quoting Michigan v. Long, 463 U.S. 1032, 1042 (1983). However, because the state argued procedural default and the state court did not reject that argument, the state court is presumed to have applied the state's procedural default rules. See Bennett v. Fortner, 863 F.2d 804, 807 (11th Cir.) ("[W]hen a procedural default is asserted on appeal

and the state appellate court has not clearly indicated that in affirming it is reaching the merits, the state court's opinion is based on the procedural default."), cert. denied. 490 U.S. 1071 (1989), and Nichols v. Wainwright, 783 F. 2d 1540, 1542 (11th Cir. 1986) ("[T]his court may presume, in the absence of any evidence to the contrary, tha[t] an established default rule which was briefed to a state court was applied by that court when it affirmed a conviction without opinion.").

Callaghan procedurally defaulted his first two claims of prosecutorial misconduct alleged in Ground Two and he cannot show either "cause and prejudice" or "manifest injustice" to overcome the procedural default. Consequently, these claims are procedurally barred from federal review on the merits.

Callaghan's next two claims of prosecutorial misconduct, that the prosecutor asked the jury venire whether they could convict the defendant even if the victim did not testify and the prosecutor called two civilian witnesses to testify whether they were offended that the parade was stopped, are procedurally defaulted because Callaghan failed to present these claims to the state courts. These claims are, therefore, unexhausted. See generally McNair v. Campbell, 416 F.3d 1291, 1301-07 (11th Cir. 2005), cert. denied, ___ U.S. ___, 126 S.Ct. 1828 (2006).

To meet the exhaustion requirement, Callaghan must present his claims to the state courts before raising them in federal court, and the claims raised in the federal court must be the same claims presented to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971) ("[W]e have required a state prisoner to present the state courts with the same

claim he urges upon the federal courts."); Rose v. Lundy, 455 U.S. 509, 518-19 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error."). "Mere similiarity of claims is insufficient to exhaust." Duncan v. Henry, 513 U.S. 364, 366 (1995). Additionally, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982). See also Kelley v. Sec'y for Dept. of Corr., 377 F.3d 1271, 1345 (11th Cir. 2004) ("The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record.") (citations ommitted). The reverse of this statement is likewise true, that is, it is not enough to present the federal claim to the state courts but not the facts necessary to support the claim. See, e.g., Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983) ("The exhaustion requirement is not satisfied if a petitioner presents new legal theories or entirely new factual claims in support of the writ before the federal court.").

The respondent opposes these grounds specifically based on Callaghan's failure to exhaust.* The failure

---

* This court would have to apply the exhaustion doctrine, even if the respondent did not argue Callaghan's failure to exhaust, unless the respondent specifically waived the exhaustion requirement. "[B]ecause the State did not expressly waive McNair's procedural default in this case, we hold that § 2254(b)(3)['s requirement that the state must expressly waive exhaustion] applies and that McNair is procedurally barred from raising his extraneous evidence claim." McNair v. Campbell, 416 F.3d at 1305.

to properly exhaust state court remedies when remedies are available results in a procedural default of the unexhausted claims. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999) ("Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims."), McNair v. Campbell, 416 F.3d at 1305 ("It is well established that when a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure also constitutes a procedural bar.", Kennedy v. Herring, 54 F.3d 678, 684 (1995) ("If a claim was never presented to the state courts, the federal court considering the petition may determine whether the petitioner has defaulted under state procedural rules."), appeal after remand, Kennedy v. Hopper, 156 F. 3d 1143 (11th Cir.), cert. denied sub nom Kennedy v. Haley, 526 U.S. 1075 (1999). Consequently, these claims are procedurally barred from federal review on the merits.

Ground Three

Callaghan alleges that the trial court erred by refusing to instruct the jury on the "necessity defense." The trial judge ruled that given the facts of the case—Callaghan's chaining himself to the roadway to interfere with the parade's progress as a means of protesting a float he believed was demeaning to Native Americans—Callaghan was not entitled to the "necessity defense" instruction because Callaghan failed to meet all of the requirements.

> There is a case, it's out of the Fourth District... which is W.E.P., Jr. v. State,

located at 790 So.2d 1166. And what it says the necessary elements of a necessity defense are, one, the defendant reasonably believed that his action was necessary to avoid the imminent threat of death or serious bodily injury to himself or others; two, the defendant did not intentionally or recklessly place himself in a situation in which it would be probable that he would be forced to choose the criminal conduct; three, there existed no other adequate means to avoid the threatened harm except criminal conduct; and then four, harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it; and the last one is five, the defendant ceased the criminal conduct as soon as ...the necessity or apparent necessity ended. And the cases all say that these elements must be present before the necessity defense can be offered.

And starting with number one, the defendant reasonably believed his action was necessary to avoid the imminent threat of death or serious bodily injury to himself or others seems to me to be profoundly absent. And then number two, the defendant did not intentionally or recklessly place himself in a situation in which it would be probable that [he] would be forced to choose the criminal conduct. Again, I would say that that's probably not going to be evident by what we've seen. And

> then there's three, there existed no other adequate means to avoid the threatened harm except criminal conduct. I haven't found that from the testimony so far, but I'll give you surely the opportunity to make all the arguments you feel are necessary. Four, harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it; that may be the case or at the very least in the defendant's mind may be the case. And then five, the defendant ceased the criminal conduct as soon as necessity or apparent necessity ended, and I think five again is absent. So of the five that must be offered, only one it appears to me may be present.

Respondent's Exhibit 4 at 346-48.

The procedure for selecting jury instructions and charging the jury is controlled by state law. The trial judge rejected Callaghan's requested jury instruction based on state law. Federal review of this state law issue is very limited. "Questions of state law rarely raise issues of federal constitutional significance, because a state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." Tejada v. Dugger, 941 F.2d 1551, 1560 (11th Cir. 1991) (citation omitted), cert. denied, 502 U.S. 1105 (1992). Federal habeas corpus review is especially limited when reviewing the propriety of jury instructions from a state trial. "Our limited role on habeas review, when faced with a challenge to a state law jury charge, is to determine whether any

error or omission in the jury charge was so prejudicial as to amount to a violation of due process." Agan v. Vaughn, 119 F.3d 1538, 1545 (11th Cir. 1997), cert. denied, 523 U.S. 1023 (1998). See also Watson v. Dugger, 945 F.2d 367, 371 (11th Cir. 1991) ("A federal court may find a due process violation if the failure to give additional requested instructions beyond those necessary for the offense makes the trial 'fundamentally unfair.'"). The trial court correctly determined that Callaghan had failed to meet each of the five elements state law requires before entitlement to a "necessity defense" instruction. Callaghan has not shown that his trial was "fundamentally unfair" without the requested instruction or that the denial of the instruction amounted to a violation of due process.

Accordingly, Callaghan's petition for the writ of habeas corpus (Doc. 1) is **DENIED**. Callaghan's motion for summary judgment (Doc. 12) is **DENIED**. The respondent's motion to dismiss individually named party (Doc. 7) is moot. The clerk shall enter a judgment against Callaghan and close this action.

ORDERED in Tampa, Florida, on March 21, 2007.

/s/ STEVEN D. MERRYDAY
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DANIEL J. CALLAGHAN,

Petitioner,

v. Case No. 8:06-cv-1887-T-23TGW

STATE OF FLORIDA,

Respondent.
_____/

ORDER

Callaghan filed a petition for the writ of habeas corpus and paid the required filing fee. Having reviewed the petition, the court finds that the petition warrants service on the named respondent.

Callaghan also seeks an "Emergency Hearing and Temporary Injunction" (Doc. 2), in which he represents that the thirty-day "sentence has yet to be carried out." The court will expedite review of the petition, but injunctive relief is not warranted.

Accordingly, the "Motion for Emergency Hearing and Temporary Injunction" (Doc. 2) is **DENIED**. The clerk is directed to send a copy of this order and the petition (Doc. 1) to the respondent, including the Attorney General of the State of Florida. The respondent shall answer the petition within **TWENTY (20) DAYS** and show cause why the

petition should not be granted. The answer shall respond to the allegations in the petition. In addition, the answer shall state whether Callaghan has exhausted his state remedies, including any post-conviction remedies and appeals. If the respondent contends that Callaghan has not exhausted his state remedies, the answer shall contain a detailed explanation of which state remedies are still available to Callaghan.

The answer shall disclose whether the state court held an evidentiary hearing at either the pre-trial, trial, or post-conviction stage. If an evidentiary hearing was held, the answer shall state whether a transcript of the proceeding is presently available and, if not, whether and approximately when one will be available. If the transcript is presently available, or is procurable within the time fixed for filing the answer, the transcript shall be filed simultaneously with the record of the pre-trial, trial, and/or post-conviction proceedings. Otherwise, the transcript shall be filed when it becomes available.

If Callaghan appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the briefs on appeal and of the opinion of the appellate court, if any, shall also be filed with the answer. In addition, the answer shall contain the citation(s) of the state court opinion(s) that is (are) reported. **The answer shall also state whether the United States District Court Judge presiding over this case or the United States Magistrate Judge assigned to this case was involved in any of the state court proceedings in the Petitioner's case. Respondents have an ongoing duty to inform the Court of such involvement if the case is hereafter reassigned to another judicial officer.**

Before counsel has appeared for the respondent, Callaghan shall send to the respondent a copy of every pleading, motion, or other paper submitted for filing in this case. After counsel has appeared for the respondent, copies of documents shall be sent directly to counsel for the respondent rather than to the respondent personally. Callaghan shall include with the original document submitted for filing a certificate stating the date that an accurate copy was mailed to the respondent or counsel for the respondent. If any document submitted for filing does not include a proper certificate of service, the document will be stricken and disregarded. Callaghan shall advise the court of his current mailing address at all times, especially if Callaghan is released from custody. Failure to do so may result in the dismissal of this action.

Both parties shall insure that all transcripts, briefs, and other documentary exhibits are individually marked for identification, and that a table of contents or index is included to aid the court in locating individual exhibits.

After the respondent files his answer, Callaghan has 20 days to file his reply. If the respondent files a motion to dismiss, Callaghan is advised out of an abundance of caution[1] that the granting of the motion would result in the dismissal of this case. If the motion to dismiss includes supporting documents, the court could construe the request to dismiss as a motion for summary judgment. In

---

[1] See Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985), and Milburn v. United States, 734 F.2d 762 (11th Cir. 1984), wherein the court expressed concern about pro se litigants in summary judgment cases.

preparing an opposition, Callaghan should be aware of the provisions of Rule 56 of the Federal Rules of Civil Procedure. When a motion for summary judgment is supported by affidavits and/or other documents, the party opposing the motion may not depend upon the mere allegations in the pleadings. Pursuant to Rule 56, Federal Rules of Civil Procedure, the party opposing the motion must respond with counter sworn affidavits and/or documents that specifically show that there is a genuine issue of material fact in dispute. If the opposing party fails to oppose the motion, or the opposition fails to comply with the requirements of Rule 56, the court may declare the facts in the affidavits and/or documents supporting the motion as true and find there are no genuine issues of material facts in dispute. In that event, if the applicable law allows, the party who filed the motion will be entitled to have the motion granted and final judgment entered in his favor. In that event there will be no evidentiary hearing and the case will be closed.

If Callaghan fails to oppose the motion to dismiss, or construed motion for summary judgment, within 20 days, the motion could be decided without further notice.

ORDERED in Tampa, Florida, on October 21, 2006.

/s/ STEVEN D. MERRYDAY
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX F

Supreme Court of Florida

TUESDAY, SEPTEMBER 12, 2006

CASE NO. SC06-1742
Lower Tribunal No.: 2D04-5375

DANIEL CALLAGHAN vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

th
Served:

DANIEL CALLAGHAN
SUSAN M. SHANAHAN
HON. MICHAEL F. ANDREWS, JUDGE
HON. JAMES BIRKHOLD, CLERK
HON. JED PITTMAN, CLERK

APPENDIX G

Supreme Court of Florida
Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

THOMAS D. HALL
CLERK
DEBBIE CAUSSEAUX
CHIEF DEPUT CLERK
GREGORY J. PHILO
STAFF ATTORNEY

ACKNOWLEDGEMENT OF NEW CASE

September 12, 2006

RE: DANIEL CALLAGHAN vs.
STATE OF FLORIDA

CASE NUMBER: SC06-1742
Lower Tribunal Case Number: 2D04-5375
Lower Tribunal Filing Date: 8/28/06

The Florida Supreme Court has received the following documents reflecting a date of 9/1/2006.

Notice to Invoke Discretionary Jurisdiction
(Seven Additional Uncertified Copies Received 8/29/06)
Petitioner's Brief of Appellant-Defendant Criminal Case (Received 8/29/06)
(original and seven copies)
Petitioner's Emergency Motion for Stay (Received 8/29/06) (original and six copies)
Attorney General's Letter dated August 30, 2006

Second District Court of Appeal Letter dated August 30, 2006

Filing Fee: Paid in Full
Receipt Number: R2006-1004778

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

th
cc:
DANIEL CALLAGHAN
SUSAN M. SHANAHAN
HON. JAMES BIRKHOLD, CLERK
HON. JED PITTMAN, CLERK

APPENDIX H

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY, FL.
04-01251CFAWS-3, O4-02205MMAWS 04-02206MMAWS

STATE OF FLORIDA

vs. OFFICIAL USE ONLY

DANIEL CALLAGHAN
SPN: 00447395

AFFIDAVIT OF CHRISTINE GORACIO

UNDER PENALTY OF PERJURY, I, CHRISTINE GORACIO, a juror, certify that the information contained herein is true, and says:

I was a member of the jury that convicted Daniel Callaghan last week. I am sick about our verdict. The whole time during the trial I was thinking the Defendant was not guilty of the crime Battery on a Law Enforcement Officer.

When we went back to deliberate four of us thought that the Defendant was not guilty of Battery on a Law Enforcement Officer. I thought it was an accident. However, one of the men on the jury kept saying that "it was a law enforcement officer and it doesn't matter; if you just touch a police officer it's a Battery on a Law Enforcement Officer." Although I kept arguing with him, everyone started agreeing with him and the foreperson finally said, "OK, then I

think that we should come back on the lesser included charge." However the same man yelled, "you can't do that one because he was a law enforcement officer and we can't convict him of the lesser charge." But then I started getting confused because I thought, if we aren't allowed to vote guilty of the misdemeanor battery, why would the judge give us that jury instruction?"

I then asked why did you change your mind, and the other people said "the pictures show it." However I never saw anything in the pictures that showed Callaghan doing anything.

I have a reasonable doubt and I had a reasonable doubt on the day of the verdict. I do not think that Callaghan committed a Battery on a Law Enforcement Officer because it was an accident.

I felt pressured to reach a verdict which agreed with the others. Once or twice someone said "don't you want a cigarette." The reason I voted guilty instead of not guilty was because I felt confused and did not know what to do.

I know that the decision I made was wrong. I am worried sick and I can't sleep or concentrate on work because of our verdict.

I do not want Mr. Callaghan to go to jail.

Although I am filing this affidavit, I still want to keep my identity anonymous and would like the original sealed.